

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF
SRI LANKA**

*In the matter of an application for mandates in
the nature of writ of Certiorari and Mandamus
under and in terms of Article 140 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.*

CA/WRIT/56/2022

1. Maryanne Indra Beare
Flat 5, Witley House,
Garfield Road, Addelstone, KT15
2GF, Surrey, United Kingdom.

PETITIONER

Vs.

1. Hon. Attorney General
Attorney General's Department
No.159, Hulftsdorp,
Colombo 12.
2. OIC-Tourist Police Division
No.78, Galle Road,
Colombo 03.
3. Director-Tourist Police Division
No.78, Galle Road,
Colombo 03.
4. Director-Police Legal Division
Police Headquarters
Colombo 01.
5. Inspector General of Police
Police Headquarters

- Colombo 01.
6. Seasons Lanka Retreat Pvt. Ltd
No.120, Havelock Road
Colombo 05.
 7. Sanka Ravi Wijesinghe
No.45, Edward Lane,
Colombo 03.
 8. Vipul Kumararatne Keembiya
Hettige,
No.63, Alakeshwara Road,
Ethulkotte,
Kotte.
 9. Jeevaka Dushan Wijesinghe
No.45, Edward Lane,
Colombo 03.
 10. Richard Philip Smith
Jalann Merttanardi 86E,
Kerobokan Bal 80362, Australia and
at No.120, Havelock Road,
Colombo 05.
 11. Jackson Oppy
9IBIS Gorge, Cairnlea, Victoria,
Australia 3023
and at No.120, Havelock Road,
Colombo 05.
 12. Konara Mudiyanseelage Dasanayake
Udena Manohara Kendaragama
No,168/7 Siri Jayasundara Mawatha,
Nawala Road,
Nugegoda.
 13. Minoli Charika Wijesinghe

No.45, Edward Lane,
Colombo 03.

14. Eshantha Chandra de Silva
No.30/4A, De Mel Road
Katubedda,
Moratuwa.

15. National Dangerous Drugs Control
Board,
No.383, Kotte Road,
Rajagiriya.

RESPONDENTS

Before: Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel: Kamal Suren Perera for the Petitioner

Dilan Ratnayake SDSG with Malik Azeez SC for the 1st to 5th and 15th Respondents
Sanjeewa Jayawardana PC with Dr. Milhan Mohommed and Nalin
Amarageewa for the 6th to 9th, 12th to 14th Respondents

Supported on: 26.05.2023, 22.09.2023

Decided on: 03.11.2023

Sobhitha Rajakaruna J.

The submissions were made on behalf of the Petitioner who seeks an Order from this Court at this stage to issue formal notice on the Respondents. Issuing such formal notice is strongly opposed by the Respondents.

The Petitioner on 19.01.2018 made a complaint to the Sri Lanka Tourist Police Division against the 6th Respondent Company for cheating and misleading the Petitioner. The

Petitioner states that during the latter part of the year 2017, a total sum of £5,228 was paid to the 6th Respondent for a 3-month residential rehabilitation program in Sri Lanka for her son who was a victim of drug addiction. Thereafter, there had been a number of monetary transactions between the Petitioner and the 6th Respondent/affiliated companies. According to the Petitioner, she has received a sum of £2,292 from Certis Lanka Services Group Pvt. as a 'goodwill gesture' via telegraphic transfer and similarly, the Petitioner contends that on a later date (i.e. 29.06.2020) she received a further refund of £1,908 as another 'goodwill gesture' from Certis Lanka Security Solutions (Pvt) Ltd. The Petitioner further states that, out of the sum allegedly cheated by the 6th Respondent, the Petitioner is yet to receive the remaining £1,028. As a consequence of the complaint made by the Petitioner, the 'B' Report bearing No. B55030/2018 was filed by the Tourist Police Division in the Magistrate's Court of *Panadura*.

The Petitioner states that she had the utmost trust in the 2nd Respondent and the Sri Lanka Police Department in general that they would do a proper and comprehensive investigation pertaining to the complaint made by her. It is further submitted that the learned Magistrate of the Magistrate's Court of *Panadura* by the order, marked 'P7B', dated 09.03.2021 has terminated the proceedings in relation to the above 'B' Report based on the impugned advice ('P7A') of the Attorney General. The learned Magistrate terminated such proceedings considering an application made by the 2nd Respondent who has acted upon the impugned advice communicated to him by the Attorney General by the said 'P7A'. The Attorney General by way of the said 'P7A' has opined, based on the available written and other evidence that no sufficient material had been accrued to institute a criminal case. The contention of the Petitioner is that the said proceedings have been terminated at a time when the police had not completed the investigation relating to the complaint lodged by her.

Thus, a writ of Certiorari is sought quashing 'P7A' alleging that the said decision of the Attorney General is biased; unreasonable; ultra vires; malafide; and against sections 393(2) and 393(3) of the Code Of Criminal Procedure Act No. 15 of 1979 ('CCPA'). The order marked 'P7B' is also challenged on the basis that the said order of the learned Magistrate is unreasonable; wrong; and the learned Magistrate has acted as a rubber stamp of the Attorney General without exercising due discretion vested upon the Magistrate. Additionally, a writ of

Mandamus is sought directing the 1st to 5th Respondents to conduct a complete and comprehensive investigation in relation to the said 'B' Report filed in the Magistrate's Court.

The Petitioner drawing the attention of this Court to the 'B' Report dated 09.03.2021 (part and parcel of 'P7') asserts that the Attorney General has summoned the relevant case record of the Magistrate's Court of *Panadura* while the investigations were pending and it is unreasonable for the Attorney General to advise the Police at that point of time on the potential of formulating a criminal case. The powers of the Attorney General are, inter alia, stipulated in section 393 of the CCPA and accordingly, it is lawful for the Attorney General to give advice, whether on application or on his own initiative to State Departments, public officers, officers of the police and officers in corporations in any criminal matter of importance or difficulty.

Therefore, I take the view that it is imperative to ascertain whether the Attorney General has exercised his discretion lawfully and also whether there are any exceptional circumstances that call for further investigation or are ignored by the police officers.

The learned Senior Deputy Solicitor General ('SDSG') invited this Court to go through the file maintained by the Attorney General's Department pertaining to the *Panadura* Magistrate's Court Case No. B55030/2018. The learned SDSG made the said application to enable the Court to assess the decision making process of the Attorney General in respect of the decision reflected in 'P7A'. Since there was no specific objection from the learned Counsel for the Petitioner the Court decided to accept the said file bearing No.WP5/07/2019 maintained by the Attorney General's Department, only for the perusal of the two Honorable Judges of this panel. Such a decision was taken by this Court in the best interest of justice and also bearing in mind that the Petitioner will not have the privilege to refute any remarks made by the Attorney General or any other officer in the said file.

The aforesaid file has been opened consequent to a written representation made to the Attorney General by a Counsel on behalf of the 6th Respondent. The learned Additional Solicitor General ('ASG') who has submitted a report in the said file has observed that all paid inmates of the 6th Respondent's rehabilitation center were required to enter into an agreement with the 6th Respondent and it is a printed document that contains several

conditions applicable to the inmate; and deviation from those conditions would be considered as a violation of the said contractual terms. One of the main conditions is that the inmate should not bring any drugs, alcohol or paraphernalia onto the premises and he should not be under the influence of any mood or mind-altering substance.

As per the said Report, it is observed that the Petitioner's son who was an inmate was to be repatriated back to the United Kingdom midway through the rehabilitation program due to his addiction to valium, a potent sedative that had been obtained surreptitiously in large quantities. The management of the 6th Respondent company considering this as a violation of a cardinal condition of the agreement has decided to immediately discontinue his rehabilitation process. The legal issue identified by the said ASG is whether the facts disclose a criminal offense alleged to have been committed by the above-named 6th Respondent and its officers. The final recommendation made by the said ASG is that no criminal offense has been disclosed and if any breach of contract or duty of care exists on the part of the 6th Respondent such matters should be adjudicated in a Civil Court.

It is important to note that the investigations in relation to the alleged death of the son of the Petitioner are not pertinent to deciding the issues of the instant Application. The said ASG has categorically mentioned in the said Report that the Attorney General's Department may take appropriate decisions with regard to the aforesaid death once the Information Book (IB) extracts in relation to the respective investigations are received.

On a careful perusal of the material submitted to this Court including the documents contained in the Attorney General's said file, it implies that the Petitioner has made the initial complaint to the Tourist Police Division because she/her son did not receive the money that was agreed upon in a contract between the Petitioner and the 6th Respondent/affiliated companies. Neither the Petitioner nor the Attorney General has indicated that there is additional material that needs to be considered by the Court regarding the matters specified in the Petition of the Petitioner. At no point during this process has the learned counsel representing the Petitioner in open court or the Petitioner herself at a different forum disclosed any exceptional circumstances that call for additional investigation.

Furthermore, I'm of the view that it needs consideration whether there are any sufficient material made available to this Court or to the relevant Police Officers who conducted the investigation, satisfying the below-mentioned elements to establish the purported unlawfulness of the impugned decision of the Attorney General.¹

- I. Applicability of the 'No evidence rule',
- II. Whether the Attorney General has taken a decision assuming a jurisdiction which he doesn't have or exceeding his jurisdiction.
- III. Whether the Attorney General has taken a decision exercising his prosecutorial discretion in bad faith/ mala fide or with ulterior motive or with political motivation.
- IV. Whether the decision would amount to an abuse of process.
- V. Procedural irregularity or existence of any illegality during the decision-making process.
- VI. Whether there is a clear miscarriage of justice.

By only paying attention to the contents of the Attorney General's said file No.WP5/07/2019 and the Petition of the Petitioner, I see no evidence up to this stage which is sufficient for anybody to declare the Attorney General's decision reflected in 'P7A' is illegal or unlawful. However, it is appropriate to clarify this position further by way of affidavits and statements of objections of the Respondents.

Anyhow, the crucial question that needs to be decided in the instant Application is something else. Given the significance of the legal issue that the said learned ASG considered in his Report, a reasonable question arises whether the learned Magistrate would be able to efficaciously and adequately determine any primary issue pertaining to the 'B' Reports based solely on the circumstances surrounding the Petitioner's complaint. In contrary but more importantly, the cardinal question is whether the learned Magistrate is bound by advice given to the police by the Attorney General under section 393(2) of the CCPA at a time where the police have not concluded investigations in respect of the complaint made by the Petitioner. On a perusal of the 'B' Reports annexed to the Petition, it is clear that the investigations are

¹ I have formulated some guidelines in reference to the prosecutorial discretion of the Attorney General in *Sandresh Ravindra Karunanayake v. Hon. Attorney General and Others CA/WRIT/441/2021* decided on 28.02.2023

not concluded and the 2nd Respondent has not formally informed the learned Magistrate whether the investigations are concluded. Thus, a vital question which needs examination is whether a learned Magistrate is bound to form an independent finding before terminating the proceedings based on advice given to the police by the Attorney General at a time particularly when the investigations are not concluded.

In light of the above, I take the view that the instant Application raises the above questions of law that should be assayed and evaluated at a fuller hearing of this case. Based on such circumstances the Petitioners have satisfied the initial threshold requirement which warrants this Court to issue formal notice of this Application on the Respondents.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree

Judge of the Court of Appeal